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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|---|-------------|----------------------|---------------------|------------------|
| 09/769,245 | 01/26/2001 | Jeffrey Ray Stout | BO 44277 | 5103 |
| 466 | 7590 | 09/22/2004 | EXAMINER | |
| YOUNG & THOMPSON 745 SOUTH 23RD STREET 2ND FLOOR ARLINGTON, VA 22202 | | | | CHOI, FRANK I |
| | | ART UNIT | | PAPER NUMBER |
| | | 1616 | | |

DATE MAILED: 09/22/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

| | | |
|------------------------------|--------------------------------------|-------------------------------------|
| Office Action Summary | Application No. 09/769,245 | Applicant(s) STOUT ET AL. |
| | Examiner Frank I Choi | Art Unit 1616 |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

THE MAILING DATE OF THIS COMMUNICATION:

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on 02 July 2004.

2a) This action is **FINAL**. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) Claim(s) 1-26 is/are pending in the application.
4a) Of the above claim(s) _____ is/are withdrawn from consideration.
5) Claim(s) _____ is/are allowed.
6) Claim(s) 1-26 is/are rejected.
7) Claim(s) _____ is/are objected to.
8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) All b) Some * c) None of:
1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. _____.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) Notice of References Cited (PTO-892)
2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
 Paper No(s)/Mail Date .
4) Interview Summary (PTO-413)
 Paper No(s)/Mail Date. ____ .
5) Notice of Informal Patent Application (PTO-152)
6) Other: _____ .

DETAILED ACTION

A request for continued examination under 37 CFR 1.114 was filed in this application after appeal to the Board of Patent Appeals and Interferences, but prior to a decision on the appeal. Since this application is eligible for continued examination under 37 CFR 1.114 and the fee set forth in 37 CFR 1.17(e) has been timely paid, the appeal has been withdrawn pursuant to 37 CFR 1.114 and prosecution in this application has been reopened pursuant to 37 CFR 1.114. Applicant's submission filed on 7/2/2004 has been entered.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Simone (US Pat 5,397,786) in view of Weinstein et al. (U.S. Pat. 6,013,290), WO 96/04240, Fang (U.S. Pat. 5, 886,040), Webster's Dictionary (10th Ed.), Odian et al. (Schaum's Outline), Hultman et al. (U.S. Pat. 5,767,159), St. Cyr et al. (U.S. Pat. 6,159,942) and Krotzer et al. (US Pat. App. Pub. 2001/0008641) for the reasons of record set forth in the prior Office Action and the further reasons below.

Simone, Weinstein et al., WO 96/04240, Fang, Webster's Dictionary (10th Ed.), Odian et al., Hultman et al. and St. Cyr et al. were discussed in the prior Office Action and the same are incorporated herein.

Krotzer et al. teaches the use of creatine and phosphorus for body building in which the daily intake amount may be obtained by a single serving or by multiple serving, and that the most preferred serving for phosphorus is 2,690 mg (Paragraphs 0041-0042).

Examiner has duly considered Applicant's arguments but deems them unpersuasive.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Further, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

Applicant's argue that 2,500 mg is the maximum amount of electrolyte permitted in the Simone beverage. However, as indicated above, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference. Although Simone discloses the use of up to 2,500 mg, Krotzer discloses that amounts greater than the same are used for use in bodybuilding. Therefore, one of ordinary skill in the art would have been motivated to use greater amounts of phosphorous where bodybuilding in addition to rehydration is desired. Further, Simone and Krotzer are not disparate references. The Simone drink is suitable for use with athletes and Krotzer is suitable for use in the strengthening and toning of body muscles, decreasing an individual's ratio of body fat to muscle, an

improvement in the appearance of muscle strength and tone (Krotzer at Pg. 1, paragraph 0009).

Clearly an athlete would be considered with strengthening and toning of body muscles, as such, one of ordinary skill in the art would expect that the Krotzer composition would be suitable for use in athletes.

Applicant argues that one of ordinary skill in the art would not be motivated to selectively modify the rehydration drink of Simone as to increase the phosphorus content per Krotzer. However, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 208 USPQ 871 (CCPA 1981). Further, Examiner has made no indication that one would have to ignore the other teachings of Krotzer. “The use of patents as references is not limited to what the patentees describe as their own inventions or to the problems with which they are concerned. They are part of the literature of the art, relevant for all they contain.” *In re Heck*, 216 USPQ 1038, 1039 (Fed. Cir. 1983) (quoting *In re Lemelson*, 3158 USPQ 275, 277 (CCPA 1968)).

Therefore, the claimed invention, as a whole, would have been *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, because every element of the invention has been collectively taught by the combined teachings of the references.

Conclusion

A facsimile center has been established in Technology Center 1600. The hours of operation are Monday through Friday, 8:45 AM to 4:45 PM. The telecopier number for accessing the facsimile machine is (703) 872-9306.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Frank Choi whose telephone number is (571)272-0610. Examiner maintains a flexible schedule. However, Examiner may generally be reached Monday-Friday, 8:00 am – 5:30 pm (EST), except the first Friday of the each biweek which is Examiner's normally scheduled day off.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's Supervisor, Mr. Gary Kunz, can be reached at 571-272-0887. Additionally, Technology Center 1600's Receptionist and Customer Service can be reached at (571) 272-1600.

FIC

September 20, 2004



S. MARK CLARDY
PATENT EXAMINER
GROUP 1200

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